United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

74-2156

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

FRED LOWENSCHUSS, Trustee for Fred Lowenschuss Associates Pension Plan, individually and on behalf of all other persons and shareholders of Great Atlantic & Pacific Tea Co., Inc., who are similarly situated,

Plaintiff-Appellant,

—against—

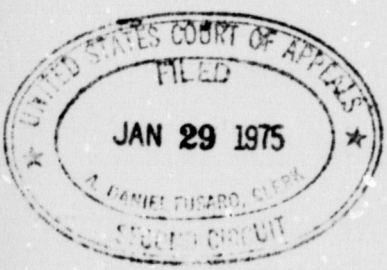
W. J. KANE, H. J. BERRY, R. M. BROWN, JR., W. CORBUS, D. K. DAVID, H. C. GILLESPIE, J. S. KROH, E. A. LE PAGE, R. F. LONGACRE, M. D. POTTS, J. M. SCHIFF, P. A. SMITH, H. TAYLOR, JR., E. J. TONER, W. I. WALSH, N. F. WHITTAKER, J. A. ZEIGLER (all of whom are officers and directors of Great Atlantic & Pacific Tea Co., Inc.), and C. G. BLUHDORN and GULF & WESTERN INDUSTRIES, INC., and KIDDER PEABODY & CO.,

Defendants-Appellees,

RACHEL C. CARPENTER,

Appellant.

REPLY BRIEF FOR APPELLANT CARPENTER



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Defendants-Appellees,

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Appellant.

REPLY BRIEF FOR APPELLANT CARPENTER

Statement

Wrapping themselves in the self-righteous mantle of "equity" and of "overriding federal policy" (G&W Br. pp. 4, 28)* defendant-appellees Gulf & Western Industries, Inc. ("G&W") and Charles G. Bluhdorn ("Bluhdorn") maintain that the order of the district court (*Gulf & West-*

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* The brief of appellees Gulf & Western Industries, Inc., and Charles G. Bluhdorn will be referred to as "G&W Br."

ern Indus. Inc. v. *Great A&P Tea Co., Inc.*, 356 F. Supp. 1066, aff'd. 476 F.2d 687) enjoining the consummation of G&W's tender offer for shares of Great Atlantic & Pacific Tea Co., Inc. ("A&P") rendered the tender contract impossible of performance and relieved them of all liability to A&P's shareholders. The fact that the injunction order was based on G&W's outright deception in representing that it intended to acquire the A&P shares for "investment" when, in truth, its purpose was to acquire control over A&P, is simply ignored. As G&W and Bluhdorn would have it, regardless of any fraud they committed, they have incurred no liability and the shareholders of A&P have no remedy.

Again, G&W and Bluhdorn persist in treating the action as one solely to compel G&W to "consummate" the tender offer, (i.e. to accept the tendered shares), in violation of the injunction order. (G&W Br. pp. 2, 4, 12, 19, 22, 26). The fact is that the prayer for relief in the Lowenschuss complaint expressly seeks to recover *damages* (15a); and this is the only relief that appellant Carpenter seeks to obtain.

In this connection, repeated reference is made by G&W and Bluhdorn to the position, apparently previously taken by appellant Lowenschuss, urging that the tender offer should be consummated (G&W Br. pp. 10, 11, 12, 22). Whatever conceptions appellant Lowenschuss may have had as to the appropriate remedy available, his views should not prejudice the members of the class, particularly appellant Carpenter, who alone tendered almost 2,000,000 A&P shares, more than one-half of the total shares tendered.

By attempting to veil their own wrongdoing, which prompted the injunction order, and upon the assumption that appellants seek only to compel "consummation" of the tender offer in violation of the injunction order—G&W

and Bluhdorn erroneously conclude that the plaintiffs are without remedy for G&W's failure to perform its unconditional agreement to accept and pay for shares properly tendered pursuant to its offer and for G&W's violation of federal law.

For all that appears from G&W's brief, the judgment dismissing the complaint might have resulted, not from a motion for summary judgment, but from a trial on the merits. As noted in our main brief (pp. 20-22), and as further appears hereafter (*infra* p. 15), at the very least, the motion of G&W and Bluhdorn for summary judgment involves issues of fact requiring denial of their motion.

POINT I

Answering Points I and II of G&W's Brief.

G&W and Bluhdorn do not—and cannot—deny that their offer to purchase shares of A&P and the acceptance of that offer by shareholders who properly tendered shares in accordance with the terms of the offer, constituted a binding agreement. Their sole defense to this action for non-performance of that agreement is that the injunction order rendered performance impossible since "the offer was barred because of potential anticompetitive consequences." (G&W Br. p. 19).

G&W and Bluhdorn pointedly ignore the strictures of this Court against their fraudulent practices in representing that G&W intended to acquire the tendered shares for "investment" only and for concealing evidence that, in fact, it intended to acquire control over A&P. As this Court stated, the evidence adduced "strongly indicates that such intent [*i.e.* the intent to acquire control] was present" (476 F. 2d at 696).

Aware of the effect of their concealment and misrepresentation of material facts, G&W and Bluhdorn argue (Br. p. 20) that even if the facts had been made known "in minute detail" the appellants could not "reap any of the benefits they now claim." (G&W Br. p. 20). As G&W puts it:

> "Neither revelation nor particularization of alleged antitrust theories as part of the offer could prevent or cure an injunction based on them. All of appellant Carpenter's extravagant language about the offer being stopped because of G&W's 'concealment' of alleged facts and 'wrongful' conduct (C. Br. 9-11) misses the mark because it mistakes the operative cause." (G&W Br. p. 20).

We submit that it is G&W and Bluhdorn who "miss the mark." "Revelation" might not have been sufficient to "cure" the injunction, but it would certainly have "cured" G&W's misrepresentation and concealment and thereby eliminated the basis for its liability.*

As our main brief demonstrates (pp. 11-13), impossibility of performance resulting from an injunction order is a defense to the non-performance of a contract *only if the wrongful conduct of the defendant is not an inducing cause for the issuance of the injunction;* and if the parties are in *pari delicto.* (Main Br. pp. 15-16). The cases are clear that "impossibility" of performance is no defense where, as here, the parties are not in *pari delicto* and G&W's wrongful conduct played a significant role in the issuance of the injunction.

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*Fraud alone in the promulgation of a tender offer is, of course, a sufficient "operative cause" for the issuance of an injunction. Indeed, this Court's affirmance of the injunction order was based on *both* violation of the Clayton Act and the Williams Act.

Moreover, had G&W and Bluhdorn made full and fair disclosure the result would not necesarily "have been the same." (G&W Br. p. 20) as they contend. As this Court stated (476 F. 2d at 697):

> "The fact that, at the time it announced its tender offer, an antitrust action had not been commenced against G&W, and that its liability was uncertain, does not excuse G&W's failure to disclose all these relevant circumstances so that A&P shareholders could weigh them in reaching their decision whether or not to tender their shares.

As this Court held, had proper disclosure been made, the tendering shareholders might well have decided not to accept the tender offer, rather than to rely upon the reasonable expectation that G&W's promise to make payment would be performed (476 F. 2d at 696).

G&W and Bluhdorn seek to create the impression that plaintiffs are in *pari delicto* and are not entitled to recover because they had "actual knowledge" (G&W Br. p. 20) of the "potential antitrust bar to consummation of the offer" (G&W Br. p. 21). Upon this premise, G&W and Bluhdorn conclude (G&W Br. p. 23):

> "Thus Carpenter's claim that the judgment below leaves A&P shareholders 'without remedy' (C. Br. 19) is entirely incorrect. Even assuming a violation of Section 14(e) through defective disclosure, the remedy was the early curtailment of the offending offer. Appellant Carpenter simply objects to the cure because there was no profit in it.

As noted in our main brief (pp. 17-18), at most the shareholders might have acquired knowledge of the contentions of the contending parties, i.e. of A&P's claim that

G&W had concealed and misrepresented facts in promulgating the tender offer and that G&W vigorously denied that charge. As G&W and Bluhdorn would have it, the sole "remedy" of the A&P shareholders under these circumstances was "the early curtailment of the offending offer", i.e. to withdraw from the tender, and to thereby relieve G&W of a bad bargain! Upon the other hand, according to G&W and Bluhdorn, if the A&P shareholders elected to trust in G&W's denial of fraud, they did so at their peril. We cannot conceive that this Court will approve any such shockingly inequitable proposition of law.

G&W argues (Br. p. 42):

> "In fact, however, we have been unable to find any New York case which suggests that a person tendering pursuant to a so-called 'offer of unilateral contract', at a time when he knows the existence of that 'offer' is being challenged in a court of competent jurisdiction, can create a 'contract' which is binding in the event that such court preempts and forbids the offer."

We challenge G&W and Bluhdorn to produce a case where any court has ever held a firm contract for the purchase of stock to be invalid merely because of actual or threatened litigation relating to the right of the parties to specific performance of that agreement, particularly where the contract contained no exculpatory clause excusing performance in the event of litigation. (See our main brief p. 14.)

In any case, even assuming that plaintiffs had knowledge of all the material facts, this would not defeat their right to recover. The courts have held that under such circumstances, the salutary purposes of the securities laws, i.e. the protection of investors, would be better served by the rejection of the defense of *in pari delicto*.

In *Pearlstein* v. *Scudder & German*, 429 F. 2d 1136 (2d Cir. 1970) cert. den. 401 U.S. 1013, 91 S. Ct. 1250, 28 L. Ed. 2d 550 (1971), an investor, sued his broker for losses suffered on stocks purchased with funds advanced by the broker in excess of the legal margin limits. The defense asserted was that plaintiff had knowldege that the margin advances were illegal and, therefore, that he should be denied any recovery. In rejecting that defense, this Court held (at p. 1141):

> "However, our holding does not turn on Pearlstein's subjective knowledge of the law. In our view the danger of permitting a windfall to an unscrupulous investor is outweighed by the salutary policing effect which the threat of private suits for compensatory damages can have upon brokers and dealers above and beyond the threats of governmental action by the Securities and Exchange Commission. As the district court observed in Serzysko v. Chase Manhattan Bank, 290 F.Supp. 74, 87-90 (SDNY 1968), aff'd mem., 409 F.2d 1360 (2 Cir.), cert. denied, 396 U.S. 904, 90 S.Ct. 218 (1969), the defense of *in pari delicto* in securities law cases has been undetermined by the recent antitrust case of Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 88 S.Ct. 1981, 20 L.Ed.2d 982 (1968). There the Court held that the doctrine of *in pari delicto* would not bar a retailer from suing a manufacturer for antitrust violations when the retailer had been coerced into joining the illegal agreement.

Although *Perma Life* would apparently continue to deny recovery to plaintiffs who had not been coerced but who had benefited from the arrangement equally with the defendant, *such a*

defense does not appear desirable in the securities area here involved, even when the investor may be shown to have had knowledge of margin requirements." (Emphasis ours)

In *Nathanson* v. *Voisin, Cannon, Inc.*, 325 F. Supp. 50 (S.D.N.Y. 1971), the plaintiff sued to recover damages for losses sustained by them in the purchase of securities through the defendant-broker. The complaint alleged that the plaintiffs received "inside information" from the defendant which proved to be false, to their damage. The defendant moved for summary judgment dismissing the complaint upon the ground of *in pari delicto*, since plaintiffs, admittedly, purchased their stock upon inside knowledge without disclosing their inside information to the seller of the shares. In denying the defendant's motion for summary judgment, Judge Weinfeld held (at pp. 55-56):

> "In sum, plaintiffs were engaged in transactions designed to take advantage of the unknowledgeable holders of TST stock. Their conduct with respect to the investing public was similar to that attributed by them to the defendant, and such conduct constituted a fraudulent practice.
>
> However, plaintiffs' own recreant conduct, while a factor to be considered on the issue of whether the defense of in pari delicto is available to the defendant is not determinative. Again to be considered is the third party, the public, and what policy will best afford protection to it as intended under the securities acts. A strong suggestion of the unavailability of the defense of in pari delicto in securities violations is given by the recent ruling of the Supreme Court in Perma Life Mufflers, Inc.

> v. International Parts Corp. There the Supreme Court held in an antitrust suit that the doctrine of in pari delicto did not bar a retailer from suing a manufacturer for treble damages and to strike down an illegal tying restriction which he had helped to create and from which he had previously benefited. * * * * Nonetheless, it appears that the fundamental purpose of the securities acts in the prevention of fraud, manipulation or deception in connection with securities transactions and in compelling adherence by insiders to their duty to disclose material inside information before acting upon it, would better be achieved by disallowing rather than allowing the defense."

See also: *Perma Life Mufflers* v. *International Parts*, 392 U.S. 134, 20 L.Ed. 2d 982, 88 S.Ct. 981 (1968).

G&W and Bluhdorn argue (G&W Br. pp. 14, 22) that under § 14(d)(5) of the 1934 Act, "no tender is binding during the first seven days of an offer"; and that "The effect of this in the instant case, was to allow appellants to be forwarned of precisely the risk that later materialized." That section merely provides that no tender is binding on the "*depositor*" for the first seven days after deposit. The offeror (G&W), however, is bound from the moment the deposit is made. In any event, we do not see how this provision of the statute serves to relieve G&W of any liability.

G&W and Bluhdorn profess to construe the decision of this Court in the injunction suit between G&W and A&P into a holding that the tendering A&P shareholders have no right of recovery, regardless of any fraud that may have been perpetrated by G&W in promulgating the tender offer. Thus, G&W argues (G&W Br. p. 3)

that "In issuing the injunction, this Court expressly considered the interests of these tendering shareholders of A&P and held that they must yield to overriding federal policies." The same theme is repeated elsewhere in G&W's brief. (pp. 11, 31). This interpretation of this Court's opinion is utterly without foundation.

In considering the interest of the A&P shareholders, this Court stated (476 F.2d at 698):

> "In Butler Aviation International, Inc. v. Comprehensive Designers, Inc., 425 F.2d 842, 845 (2 Cir. 1970), we said:
>
> > "While courts should vigorously enforce the policy of honesty and fair dealing prescribed by federal securities legislation, they must guard against the risk that, at the instance of incumbent management, they may be frustrating informed stockholders from doing what the latter want."
>
> We have given careful attention to that consideration here. What we said in *Butler Aviation*, however, clearly presupposes that the shareholders are indeed informed—a premise which we have indicated above has been drawn into serious doubt in this case."

Fully aware of the "serious doubt" that the A&P shareholders were "informed," this Court could hardly have intended to condone G&W's violation of the federal securities laws by relieving it of liability for its deception and concealment of material facts. When this Court concluded that the A&P shareholders "have no inherent right to proceed with an unlawful tender," (476 F.2d at 698) we assume that this Court intended to hold *only* that the

A&P shareholders could not compel G&W to *purchase their shares* in view of the prohibitions of the Clayton Act. The holding of this Court surely did not mean that the A&P shareholders were *also* deprived of their claim for *damages* based on G&W's fraud and breach of contract.

G&W seizes (Br. p. 31) upon this Court's statement that if G&W is vindicated it could "renew" its offer as proof that the affirmance of the injunction was a holding that "discharges all obligations" under the tender agreement. This Court made no such ruling. This Court merely held that in the event G&W were vindicated, its right to acquire the A&P shares would have been renewed. In any case, this Court surely did not pass upon the right of shareholders to recover damages under the existing tender contract, a question not presented to the Court for decision.

Again, G&W and Bluhdorn contend (G&W Br. p. 30) that since this Court, in balancing the equities of the parties in the G&W injunction litigation, did not suggest that one of the hardships to be borne by G&W was the cost of paying damages to the tendering shareholders, this Court thereby impliedly held that the tendering shareholders had no right to recover damages. The sole question before this Court with respect to the rights of the tendering shareholders, was whether G&W should be enjoined from acquiring the tendered shares. The right to acquire the tendered shares, as this Court held, was prevented by overriding federal policy, as embodied in the Clayton Act. However, the question of the right of shareholders to recover *damages* for breach of contract and for violation of federal law, was not before this Court for decision and it is not surprising that this Court did not even offer any *dictum* in this respect.

Throughout their brief, G&W and Bluhdorn studiously seek to create the impression that the objective of plaintiffs

is to compel G&W to accept and pay for the tendered shares, notwithstanding the bar of the injunction order (G&W Br. pp. 2, 4, 19, 20, 26-27, 30-31). We agree, of course, that while the injunction order was in effect, G&W was barred from acquiring any of the tendered shares. However, the injunction order, granted in large measure because of G&W's fraudulent representations and concealments, could not release G&W and Bluhdorn from liability for *damages* for inducing shareholders to tender shares and to thereby suffer substantial damage. The payment of damages obviously would not violate the injunction order or any federal policy. On the contrary, as our main brief demonstrates (pp. 19-20), the imposition of such a penalty would serve to *further* the purpose of the federal securities laws by deterring the fraudulent practices against which those laws are aimed.

Such cases as *Missouri Portland Cement Co.* v. *Cargill, Inc.*, 498 F. 2d 851 (2d Cir. 1974) and *Elco Corp.* v. *Microdot, Inc.*, 360 F. Supp. 741 (D. Del. 1973); relied on by G&W and Bluhdorn (G&W Br. pp. 19, 29) are not in point. Those cases involved actions for an injunction between a target company and the company inviting a tender of shares. Neither case involved an action by shareholders of a target company against the party making the tender offer. The question, therefore, of the circumstances under which an action by shareholders against the tendering company for damages for fraud and breach of contract would lie was not before the courts in those cases.

The reliance of G&W and Bluhdorn (G&W Br. p. 23) on the case of *Levine* v. *Seilon, Inc.*, 439 F. 2d 328 (2d Cir. 1971) is misplaced. In that case, no tender offer was ever made. The action was brought on the theory that the defendant had falsely induced plaintiff to believe that it intended to make a tender offer for his preferred shares. The

plaintiff claimed damages alleging that he was deprived of the opportunity to sell his shares at the inflated price created by defendant's false representations. In the case at bar, Carpenter makes no such claim. Her claim is solely and exclusively one for damages based on defendants' breach of its agreement with her, without any legal excuse for its failure to perform.

In the *Levine* case, there was no contractual relationship between the plaintiff and defendant. Accordingly, the court held that "Levine lost nothing from Seilon's alleged fraud except the "euphoria he doubtless experienced during the summer and fall of 1968" (439 F. 2d at 335). In the case at bar, however, there was a contractual relationship between Carpenter and G&W, the breach of which deprived Carpenter of more than just "euphoria."

The case of *United States* v. *Chrysler Corp.*, 232 F. Supp. 651 (DNJ 1964) is cited by G&W (G&W Br. p. 29) for the proposition that the right of shareholders to recover a "premium" tender price is limited by an injunction. The case stands for no such proposition. The action was brought by the United States to enjoin a proposed acquisition by Chrysler of all of the assets and business of Mack Trucks, Inc. The court granted the injunctive relief requested upon the ground that there was "a reasonable probability that the Government will prevail upon a plenary trial of the cause on the merits" (p. 655). The rights of the shareholders of neither corporation were involved.

We do not understand what comfort G&W draws from the fact that it fought vigorously to prevent the injunction order. It is true that G&W opposed the accusation (sustained by this Court) that its representation that its proposed purchase of A&P shares was intended for in-

vestment purposes only was untrue. Only in this sense can it be said, as G&W contends (G&W Br. p. 36), that the injunction order was not G&W's "fault". Its "fault" was, not that it did not oppose the injunction, but rather its commission of the acts which led to it.

Moreover, as noted in our main brief (p. 12), G&W could readily have eliminated the antitrust problem through the sale by Bluhdorn of his Bohack stock. Indeed, to meet that situation, Bluhdorn and his associates had resigned from the Bohack board of directors and Bluhdorn had agreed to sell his Bohack shares within one year after the expiration of the tender offer (476 F. 2d at 691). All that Bluhdorn had to do to completely eliminate the antitrust problem was to *promptly* dispose of *all* of his Bohack stock.

G&W contends that "This Court's affirmance of the injunction hinged entirely on potential reciprocal and buyer-seller relationships *regardless* of any disposition of Bohack's shares"; and that, therefore, "Carpenter's position raises the incredible spectacle of G&W's dismembering itself * * * " (G&W Br. p. 40). This *in terrorem* argument has no basis in fact or law.

The immediate sale by Bluhdorn of all of his Bohack shares would have severed entirely the relationship between A&P and G&W and would thereby have completely eliminated any possible antitrust question. Absent any relationship between A&P and G&W, there would have been no need for G&W to "dismember" itself by selling any of its "myriad conglomerate holdings" doing business with suppliers of A&P (476 F.2d at 691). In short, this bogey-man is made of straw.

Incredibly, G&W and Bluhdorn assume the posture of aggrieved parties and charge the plaintiffs with making "overreaching claims" and seeking "windfall profits" (G&W Br. pp. 3, 18, 22). Plaintiffs seek no "windfall profits" but seek only to enforce the ordinary and usual measure of damages in a case where a defendant, without legal excuse, breaches his contract to purchase shares of stock. It is, we submit, G&W who seeks a "windfall" in the form of an unprecedented judicial license to avoid a bad bargain.

In our main brief (pp. 20-22) we noted some of the issues of fact raised by G&W and Bluhdorn's motion for summary judgment. In addition to the factual issues there mentioned, it affirmatively appears that G&W, itself, raises additional questions of fact. Thus, G&W asserts that plaintiffs are faced with the "barriers of proving causation" (G&W Br. p. 19), which obviously presents an issue of fact. Again, G&W argues that it is "incredible" that plaintiffs tendered their shares "with honest ignorance" of the facts, likewise raising an issue of fact (G&W Br. p. 21). In addition, w note that in affirming the injunction order, this Court referred to the "serious doubt" that G&W had made full disclosure. This, too, at the very least, represents an issue of fact.

Regardless of the disposition of plaintiff's motion for summary judgment,* the motion of G&W and Bluhdorn for summary judgment involves issues of fact and should have been denied by the Court below.

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* As noted in our main brief (p. 20) G&W and Bluhdorn have come forward with no facts in opposition to plaintiff's motion for summary judgment.

POINT II

With respect to Points III and IV of G&W's Brief.

Points III and IV of G&W's brief deal largely with personal matters relating to the conduct of appellant Lowenschuss, with all of which appellant Carpenter has no concern. Appellant Carpenter is a long-time shareholder of A&P and obviously did not purchase the 1,950,012 shares which she tendered in contemplation of this litigation. She is, as G&W concedes (G&W Br. p. 3), a proper member of the class on whose behalf this suit is brought.

G&W notes that Carpenter filed a notice of appearance herein "after receipt of the class notice required by the district court's order, but who filed no briefs or other papers or made any argument below" (G&W Br. p. 2). G&W omits to mention that Carpenter had no knowledge of the pendency of the Lowenschuss suit, or of its dismissal, until after the event, when she received the notice which invited her to participate in the further proceedings in the case through counsel of her own choice. G&W likewise omits to mention that this Court heretofore summarily denied G&W and Bluhdorn's motion to dismiss Carpenter's appeal upon the ground of her alleged failure to participate in the proceedings before the district court.

CONCLUSION

The order and judgment of the Court below denying plaintiff's motion for judgment and granting defendants' motions for judgment dismissing the complaint should be reversed and plaintiff's motion for judgment should be granted and defendants' motions for judgment should be denied.

Respectfully submitted,

MILTON PAULSON
Attorney for Appellant Carpenter

Service of ~~three (3)~~ Two (2) copies of the within
Reply Brief is hereby admitted
this 29th day of January, 1975

Simpson Thacher & Bartlett

Attorney(s) for Gulf & Western

KLP 9:25 AM

Service of ~~three (3)~~ Two (2) copies of the within
reply brief is hereby admitted
this 29th day of January 1975

Sullivan & Cromwell

Attorney(s) for Kidder, Peabody

Service of ~~three (3)~~ Two (2) copies of the within
reply Brief is hereby admitted
this 29 day of January 1975

Abraham E Freedman

Attorney(s) for Donaldson